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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Respondent on Review, vs. CHARLES STEVEN MCCARTHY, Defendant-Respondent, Petitioner on Review.	Marion County Circuit Court Case No. 16CR75546 CA A165026 SC S067608

PETITIONER'S REPLY BRIEF

Review of the Decision of the Court of Appeals
on Appeal from an Order of the Circuit Court for Marion County
Honorable Lindsay R. Partridge, Judge

Opinion Filed: January 29, 2020
Author of Opinion: James, J.
Concurring Judges: Lagesen, P.J. and Sercombe, S.J.

Continued ...

ZACHARY J. STERN #134967
Ferder Casebeer French & Stern, LLP
515 High Street SE
Salem OR 97301
zstern@ferder.com
Phone: 503.585.9197

Attorney for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
CHRISTOPHER PERDUE #136166
1162 Court Street NE
Salem OR 97301
chris.perdue@doj.state.or.us
Phone: 503.378.4402
Attorneys for Respondent on Review

ROSALIND M. LEE #055566
Rosalind Manson Lee, LLC
474 Willamette St., Ste. 302
Eugene, Oregon 97401
ros@mansonlee.com
Phone: 541.485.5110

Attorney for Amici Curiae

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INTRODUCTION

The state argues that this court should not reconsider the rule it created in *Brown* because (1) defendant failed to demonstrate that *Brown* and its progeny were "clearly incorrect" or "cannot be fairly reconciled" with this court's case law; (2) defendant does not advance any argument not already rejected by this court; and (3) the legislature, not this court, should craft rules when technological advances render a warrant exception unnecessary. As discussed *infra*, (1) he did, (2) he does, and (3) it has.

ARGUMENT

Before addressing each of those arguments, defendant first clarifies the import of this court's holdings in *State v. Andersen*, 361 Or 187, 390 P3d 992 (2017), and *State v. Bliss*, 363 Or 426, 423 P3d 53 (2018).

I. Because *Andersen* permits a trial court to consider facts in addition to a car's "mobility," it marked a significant shift in Oregon's automobile exception.

The state contends that *Andersen* did not "fundamentally transform the requirements of Oregon's automobile exception." Resp BOM 1. In support, the state submits that *Andersen* "retained *Brown*'s mobility-triggered exigency rule while acknowledging its practical limits" in that, where the facts demonstrate that "officers could draft and obtain a warrant quickly enough to avoid losing evidence," the automobile exception will not apply. Resp BOM 16. However, allowing trial courts to consider other facts, in addition to "mobility," when assessing exigency,

does "fundamentally transform" the requirements of the rule.

To reiterate, under *State v. Brown*, nothing "in addition to the mobility of an automobile at the time it is lawfully stopped is required to create exigency under the automobile exception[.]" 301 Or 268, 278, 721 P2d 1357 (1986). *Brown* was explicit in that

> "it does not matter whether the passenger could have taken over the custody of the car, [] whether the police had adequate personnel to back-up the arrest, whether a tow truck was available, whether a magistrate was available by telephone or otherwise, or whether a threatening crowd gathered, etc."

Id. That was the "bright line" in which the exception was born.

Under *Brown*, the specific facts confronting the officer did "not matter." But, after-*Andersen*, facts surrounding whether "a warrant could have been drafted and obtained with sufficient speed to obviate the exigency" do. Accordingly, *Andersen* marks a significant change in the framework in which Oregon's automobile exception operates.

II. The defendant in *Bliss* presumed *Brown*'s rule of mobility-triggered exigency and did not advance an argument under *Andersen*.

The state also maintains that *Bliss* "confirms" its reading of *Andersen*. Resp BOM 17. To be fair, on its face, *Bliss* does appear to adhere to this court's pre-*Andersen* formulation. 363 Or at 438 (identifying "two requirements for the automobile exception" under *Brown* and purporting to "adhere to that formulation of the rule here"). The defendant in *Bliss*, however, did not advance an *Andersen*-like challenge. In fact, the defendant's "sole argument" was that the automobile

exception could only apply upon the temporal coincidence of a car's mobility and probable cause that it contained contraband. 363 Or at 430 (noting the defendant's "sole argument is that the automobile exception does not apply when the initial stop is for a traffic violation, rather than for a criminal offense"). Thus, the defendant in *Bliss* presumed the existence of mobility-triggered exigency and merely sought to limit its scope to circumstances where an officer's visual or aural observation of a car in motion coincided with the existence of probable cause to search. For that reason, this court, in *Bliss*, was never confronted with an opportunity to determine whether, under the facts of that case, the officer could have obtained a warrant with sufficient speed to obviate the exigency that underlies the automobile exception.

Thus, because *Bliss* presumed a mobility-triggered exigency, it did not "confirm" the state's understanding of *Andersen*.

III. *Brown* was "clearly incorrect" and "cannot be fairly reconciled" with this court's case law.

Even if the state is correct that defendant reads too much into *Andersen* and Oregon's automobile exception still adheres to *Brown*'s "bright line," that does not end the inquiry. Resp BOM 2-13;16-17. Defendant has also established that *Brown* was clearly incorrect and irreconcilable with this court's Article I, section 9, jurisprudence. Pet BOM 11-20.

According to the state, *Brown* was not "clearly incorrect" because Article I, section 9, "does not prohibit all warrantless searches" but "only those warrantless searches that are unreasonable." Resp BOM 21. The state notes that "the key" to

determining the reasonableness of a warrantless search is the practical necessity for it. *Id*.; *see also State v. Quinn*, 290 Or 383, 391, 623 P2d 630 (1981) ("practical necessity" under exigent circumstances exception "may also be reasonable" under Article I, section 9). To its credit, the state also acknowledges that "a warrant exception is limited by its purposes, and if any particular application of [an] exception does not serve those purposes, that application may be unreasonable." Resp BOM 21.

From there, it concludes that "the need to give officers clear guidance in determining whether to search" is a "paradigmatic example of a reasonable warrantless search based on practical needs." Resp BOM 21. However, that conclusion ignores the premises from which it draws: prohibiting judicial consideration of whether a particular warrantless search of a car (1) was "practically necessary," or (2) "served" the purposes animating the exception, necessarily frustrates "the constitutional policy requiring a judicial examination of the particular facts to determine whether a particular search is reasonable." *State v. Meharry*, 342 Or 173, 181, 149 P3d 1155 (2006) (Durham, J. concurring).

Nor can *Brown*'s rule be harmonized with this court's Article I, section 9, case law. As noted, exceptions to our state constitutional warrant requirement are generally grounded in practical necessity. Pet BOM 16, n 2. In arguing that *Brown*'s bright-line approach "is not unique among warrant exceptions," the state identifies one subset of the search-incident-to-arrest exception that "presume[s] an exigency."

Resp BOM 23. It is true that "[a] warrantless search incident to arrest can be made for any of three purposes: (1) to protect a police officer's safety; (2) to prevent the destruction of evidence; or (3) to discover evidence of the crime of arrest." *State v. Mazzola*, 356 Or 804, 811-12, 345 P3d 424 (2015). And, with respect to that last factor, this court has stated that "[a]n arrest * * * creates the type of exigency justifying a warrantless search of the arrested person." *State v. Milligan*, 304 Or 659, 669, 748 P2d 130 (1988). But that is where the similarities between that subset of the search-incident-to-arrest exception and the *Brown* rule end.

Unlike the automobile exception, a warrantless search incident to arrest is permissible only if, under the totality of the circumstances, the search was reasonable in time, scope, and intensity. *Mazzola*, 356 Or at 811-12 ("to pass constitutional muster, such a search must relate to a crime that there is probable cause to believe the arrestee has committed, and it must be reasonable in scope, time, and intensity") In other words, though *Milligan* presumes that an arrest "motivates the arrested person to take immediate steps to destroy any incriminating evidence on his or her person," 304 Or at 669, any search taken under that exception must be "reasonable under the facts of [that] case." *State v. Caraher*, 293 Or 741, 759, 653 P2d 942 (1982) ("The question is whether it was relevant to the crime for which the defendant was arrested and whether it was reasonable under the facts of this case.") Accordingly, *Brown* cannot be reconciled with this court's Article I, section 9, jurisprudence.

In all events, the factors set forth in *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015), are non-exhaustive. This court can consider other factors that bear on whether to adhere to, or overrule, a prior decision. *Horton v. OHSU*, 359 Or 168, 187, 376 P3d 998 (2016) ("Placing a decision in one of those three categories does not exhaust consideration of other factors that can bear on whether to adhere to or overrule that decision.") Significantly, *Brown* should be revisited because, when this court created Oregon's automobile exception, it included a sunset provision on the rule.

In *Brown*, "the court did not anticipate that the police would rely on the automobile exception when advances in technology permitted quick and efficient electronic issuance of warrants." *State v. Kurokawa-Lasciak*, 351 Or 179, 188, 263 P3d 336 (2011). In fact, the *Brown* court "fores[aw] a time in the near future when the warrant requirement of the state and federal constitution [could] be fulfilled virtually without exception." 301 Or at 278 n 6. *Brown* envisioned a future where technological realities made it practicable for police to call a magistrate on a recorded line to state "the facts, given under oath, constituting the purported probable cause" and, if sufficient, "the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed." *Id.*

But *Brown*'s sunset provision would not trigger on technological advancement alone. The court also believed that the legislature would have to create a statutory framework that streamlined the warrant-application process, in light of future

development: "the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches." *Id.* The court characterized "telephonic warrants" as "only a first step in the process" it envisioned. *Id.*

However, the process available to an affiant seeking a telephonic warrant has dramatically improved since *Brown* was decided. The streamlined application process pursuant to ORS 133.545 is functionally equivalent to what *Brown* envisioned. Those statutory changes, coupled with the digital age, have triggered *Brown*'s sunset provision. *State v. Wise*, 305 Or 78, 82 n 3 (1988) ("It was the present unavailability of a general speedy warrant procedure that led the court to allow an exception for warrantless searches after stops of mobile vehicles.")

IV. As technological advancements became more ubiquitous, the legislature repeatedly amended ORS 133.545 to shorten the time necessary to procure a telephonic warrant.

Though the state correctly notes that "the telephonic warrant statute existed when this court decided *Brown*," and that "*Brown* noted that the availability of telephonic warrants was 'only a first step in the process,'" those observations, when viewed in context, support defendant's approach. Resp BOM 36. In 1986, "the telephonic warrant statute" provided:

> "Instead of the written affidavit * * * the judge may take an oral statement under oath when circumstances exist making it impracticable for a district attorney or police officer to obtain a warrant in person. The oral statement shall be recorded and transcribed. The transcribed

> statement shall be considered to be an affidavit for purposes of this section. In such cases, the record of the sworn oral statement and the transcribed statement shall be certified by the judge receiving it and shall be retained as a part of the record of proceedings for the issuance of the warrant."

ORS 133.545(5) (1985). When *Brown* was decided, a telephonic warrant could only be procured if it was "impracticable" "to obtain a warrant in person." Under that framework, the affiant, after giving an oral statement had to wait until that recorded statement was transcribed, a step that necessarily lengthened the application process. Importantly, no statutory mechanism permitted the electronic transmission of proposed warrants or electronic signatures on approved warrants.

The stop in *Andersen* occurred in 2011. 361 Or at 189. By that time, the legislature amended ORS 133.545 and provided a framework that allowed proposed warrants to be sent electronically between the affiant and magistrate. ORS 133.545(6) (2011). However, as when *Brown* was issued, ORS 133.545(5) (2011), required the affiant's "oral statement" be "recorded and transcribed." Thus, when the stop in *Andersen* occurred, the legislature shortened the time it took to *transmit* a proposed warrant to and from the issuing magistrate, however, no statutory changes expedited the application process.

Additionally, and contrary to the state's assertion that since-*Brown* "[t]he legislature also has not specified ways to speed up the drafting of warrants so that quicker transmission will result in quicker review," Resp BOM 36, the legislature, in 2013, removed the requirement that an oral statement be transcribed; thus,

significantly shortening the turnaround time in issuing telephonic warrants. Or Laws 2013, ch 225 § 1. Unlike *Andersen*—where this court's analysis focused exclusively on the time it took to procure a written warrant—the stop, in this case, occurred after the legislature enacted substantive changes to the "cumbersome" telephonic warrant application process that existed in *Brown* and *Andersen*.[1]

Thus, this case presents a different question than that raised in *Andersen*, namely, whether current technological realities *coupled* with legislative changes that expedite the warrant application process are sufficient to trigger *Brown*'s sunset provision. And, given those changes—both technological and legislative—the state's reliance on *Brown* is no longer reasonable.

V. The state's continued reliance on *Brown* is unreasonable.

Defendant does not dispute that, for three decades, the state relied on the convenience of warrantless roadside searches under the automobile exception. Resp BOM 24-26. Ordinarily, reliance on this court's decisions weigh against overruling precedent. *Farmers Ins Co of Oregon v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011) ("Stability and predictability are important values in the law; individuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and

[1] In 2019, the legislature again amended ORS 133.545 to include a provision that allowed telephonic warrants to be signed electronically, thus, additionally decreasing the turnaround time in the application and transmission process. Or Laws 2019, ch 399 § 7; ORS 133.545(8)(a). In its current form, ORS 133.545 enables an affiant to procure a telephonic warrant from a magistrate digitally.

unfairness.") In the context of Oregon's automobile exception, however, as exemplified by the facts of this case, the state's continued reliance is unreasonable.

Here, after the telephonic warrant application process was expedited in 2013, the Marion County District Attorney's Office, located in Oregon's fifth largest county, failed to implement any new procedures allowing it to adapt to the digital age. Though the Marion County District Attorney's Office considered "allowing" officers to obtain telephonic warrants, nothing ever came of it. Rep Br SER 1-2.

Instead, in this case, each on-scene officer had a cell phone and used it call insurance companies and other officers, but no attempt was made to procure a telephonic warrant. Tr 80-81; 83; 108; 116-17; 120. The state, in its response, cited testimony from Detective Smith and DDA Suver for the proposition that, at that time, "the Marion County Circuit Court had not yet established procedures for securing telephonic warrants." Resp BOM 8. However, the trial court "rejected" that testimony:

> "the state seemed to argue that there is a 'policy' from the Marion County Circuit Court bench that judges will not accept telephonic warrant requests. *The court rejects that such a policy exists* although acknowledges the bench has had discussions about some of the practical problems associated with telephonic warrants."

App Br ER-23 (emphasis added). The state also suggests that it would have taken "at least four hours" to obtain a warrant. Resp BOM 7. To be sure, there was testimony to that effect. Tr 173-74. However, the trial court did not credit that testimony:

> "At the supplemental hearing, the state went to great lengths to discuss the time-consuming process to obtain a written search warrant. One rationale proposed by the state for not seeking a search warrant is the need for accuracy when presenting the warrant to a judge. If one takes the state's argument to its illogical conclusion, then the state is really arguing that the courts should excuse police from obtaining a warrant if it is too inconvenient.
>
> "However, *the state fails to prove how inconvenient it would have been to obtain judicial authorization in this case*. The arrest occurred on a regular working day in the early afternoon. The state fails to address why one of the officers could not avail themselves of an existing process under Oregon law, make a call on a cell phone to the courthouse, lay out the facts under oath to a judicial officer and have the judicial officer determine if probable cause existed. The answer seems to be that 'we just don't do it that way.'"

App Br ER-23 (emphasis added). Nor was there any evidence in the record suggesting that the evidence would have been lost or destroyed in the amount of time it would take to obtain a warrant. App Br ER-16 (finding by trial court that "it is clear that the police lacked any reason to believe an imminent threat existed that someone would move the vehicle prior to obtaining a warrant").

For those reasons, it is unreasonable to suggest that the state's continued reliance on the *Brown* rule outweighs its reconsideration. That is particularly true here, where (1) the stop occurred in the early afternoon of a regular work day, (2) each on-scene officer was equipped with a phone capable of obtaining a telephonic warrant, (3) officers could have availed themselves of a streamlined telephonic warrant process, and (4) there was no actual, nontheoretical, risk that the evidence would have been destroyed before a warrant was obtained.

CONCLUSION

Based on the foregoing argument, defendant requests that this court reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/ Zachary J. Stern
Zachary J. Stern, OSB No. 134967
zstern@ferder.com
Attorney for Defendant-Respondent,
Petitioner on Review,
Charles Steven McCarthy

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I directed that the foregoing **PETITIONER'S REPLY BRIEF** be e-filed on December 15, 2020, by submitting the electronic form in Portable Document Format (PDF) that allows texts searching and allows copying and pasting text into another document to

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Mr. Christopher A Perdue, OSB No. 136166
Oregon Department of Justice
1162 Court St NE
Salem OR 97301
Attorney for Plaintiff-Appellant,
Respondent on Review

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length: I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(E), and, (2) the word-count of this brief is 2,907.

Type size: I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(2).

DATED: December 15, 2020

FERDER, CASEBEER, FRENCH AND STERN, LLP

/s/ Zachary J. Stern
ZACHARY J. STERN, OSB No. 134967
Attorney for Defendant-Respondent, Petitioner on Review